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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204296
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
THE TRADEMARK TRIAL AND APPEAL BOARD

JJI INTERNATIONAL, INC.	:	
Opposer,	:	Appl. Ser. No.: 85356064
v.	:	Opposition No.: 91204296
SPARKLE LIFE, LLC	:	
Applicant.	:	

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**OPPOSER JJI INTERNATIONAL, INC.'S REPLY BRIEF**

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## **INTRODUCTION**

Sparkle Life, LLC (“Applicant”) failed to present any competent evidence or legal argument to refute Opposer, JJI International, Inc.’s (“Opposer”), well-supported presentation that there is a likelihood of confusion between the SPLASHES & SPARKLES® mark and Applicant’s junior mark SPARKLE LIFE. Applicant thinly addresses the *DuPont* factors by submitting website printouts and third-party registrations to argue that Opposer’s mark is weak and entitled to narrow protection. That evidence is fraught with admissibility issues, but even if the Board considers the documents, they lack probative value. In addition, if the SPLASHES & SPARKLES® mark is as weak as Applicant argues, it would make no sense for Applicant to proceed to obtain a registration offering little protection. In any event, settled authority mandates refusal of an application to register where the field is crowded, not registration of yet another “weak” mark. The Board should find that Opposer has established likelihood of confusion under the *DuPont* factors and deny registration of Applicant’s junior mark.

Dr. Fong’s expert report further supports a finding of likely confusion. It is un rebutted. Rather than proffer a rebuttal expert report or even depose Dr. Fong, Applicant attacks Dr. Fong with extraordinary vigor and argues that the Board should reject the report. But the argument is not Applicant’s work; Applicant plagiarized the argument from an unsuccessful motion *in limine* brought by a defendant in unrelated federal court litigation involving JJI’s challenge, among other things, to a jewelry company’s application to register the mark, SPARKLE, in connection with jewelry. Many of the charges leveled against Dr. Fong that Applicant copied from the unrelated case do not apply to Dr. Fong’s report in this matter, leading to illogical and confusing assertions. Other arguments are simply unsupported by facts or law. Even when supported by evidence, the motion failed. Here, Applicant chose not to present a rebuttal expert report, depose Dr. Fong or proffer competent evidence. The Opposition should be sustained.

## **I. ARGUMENT**

### **A. Opposer Has Established A Likelihood of Consumer Confusion**

#### **1. The SPLASHES & SPARKLES® Mark is Strong**

Opposer's SPLASHES & SPARKLES® mark is inherently and commercially strong. Applicant concedes that Opposer's SPLASHES & SPARKLES® mark is incontestable and, thus, not subject to challenge for descriptiveness, and Opposer has developed considerable goodwill in the mark through substantial longstanding use in the marketplace. Applicant has submitted no evidence to refute Opposer's testimony concerning the multiple millions of dollars in sales of Opposer's SPLASHES & SPARKLES® branded jewelry products over the past ten years, as well as its significant promotional and advertising expenditures and extensive commercial reach. (Opposer's Main Trial Brief at 4-6.) Instead, Applicant relies on web searches and third-party trademark registrations to suggest widespread use of the word, "SPARKLE." As Opposer previewed in its Main Trial Brief (at pp. 18-21), Applicant's analysis is deeply flawed for several reasons and should be rejected by the Board.

First, Applicant's contention that Opposer's mark is a weak mark for jewelry is belied by its efforts in this Opposition. Although Applicant likely saved some expense by copying a defendant's motion *in limine* in an unrelated case, it nevertheless has likely incurred significant expense defending this Opposition through answer, discovery and trial briefing. If "SPARKLE" were as commercially ubiquitous as Applicant contends, a victory here would be an empty one because its own mark would be weak and thus afforded narrow protection. Given that Applicant would receive minimal benefit by prevailing under the circumstances, the Board should reject Applicant's unsupported contention that Opposer's mark is weak. Not to mention, as discussed

below, if Opposer's mark is weak (which it is not), such a finding weighs in favor of refusing another registration, not allowing it.

Second, Applicant's submission is most notable for what it does not include. Since Applicant copied The Bazar Group's argument to exclude Dr. Fong's expert report (discussed below) and derides Opposer's federal trademark action against The Bazar Group by referring to Opposer's "theory" in that case as "inexplicable"<sup>1</sup> (*see* Applicant's Main Trial Brief at 1-2), the Board may infer that The Bazar Group prevailed in litigation and its mark matured to registration. Not so. In fact, The Bazar Group's motion to preclude Dr. Fong failed, and The Bazar Group expressly abandoned U.S. Trademark Application No. 85180816 for "SPARKLE" after the PTO issued an Office Action refusing to register the mark. That Office Action substantially undermines Applicant's argument that Opposer's compound mark cannot bar Applicant's application containing the shared word "SPARKLE." The PTO denied The Bazar Group's application because its "SPARKLE" mark was likely to cause confusion with prior registered compound marks: "SPIRITUAL SPARKLE"; "CAMLA DREAM INSPIRE SPARKLE"; and "PIKA PIKA" (the foreign equivalent of "SPARKLE SPARKLE").

Third, Applicant has presented no evidence of actual commercial use of the same or similar marks by any third party. As cited in Opposer's Main Trial Brief (at p. 19), the Board has held numerous times that third-party registrations have no probative value absent evidence of extent of use. As further support, in a federal district court case decided last year, relying on substantial recent Federal Circuit and Board precedent, the district court held that it was "convinced" that third-party registrations alone cannot establish conceptual weakness. *Boldface*

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<sup>1</sup> Specifically, Applicant contends that Opposer claims that its registration for SPLASHES & SPARKLES "somehow entitles them to preclude others from use of the work (sic) SPARKLE in trademarks relating to jewelry."



*Licensing %8F Branding v. By Lee Tillett, Inc.*, 940 F. Supp. 2d 1178, 1191 (C.D. Cal. 2013); see also 2 J. Thomas McCarthy, *McCarthy On Trademarks & Unfair Competition* § 11:89 (4th ed. 2013) (hereafter *McCarthy*) (“The mere citation of third party registrations is not proof of third party uses for the purpose of showing a crowded field and relative weakness” because “[t]hird party registrations are not evidence of use ‘so as to have conditioned the mind of prospective purchasers.’”)

Here, none of the registrations Applicant cites is the same as Opposer’s SPLASHES & SPARKLES® mark, and there is wide variety among the type of jewelry each registration applies to—*i.e.*, watches vs. bracelets vs. key chains vs. diamonds vs. precious stones, among others. Applicant failed to present any evidence to show why any particular registration weakens Opposer’s mark and incontestable registration (because it cannot). Instead, it dumped a list of registrations,<sup>2</sup> apparently hoping the Board will be so overwhelmed by the number of registrations that it rejects Opposer’s Opposition out of hand.

Applicant ignores the overwhelming authority to the contrary and relies on a 30-year old Board decision, *BAF Industries v. Pro-Specialties, Incorporated*, 206 USPQ 166, 175 (TTAB 1980), to claim the Board should consider third-party registrations for combinations of the word “SPARKLE” to narrow the scope of Opposer’s protection. *BAF Industries* is inapposite and, in any event, Applicant misconstrues the import of that decision. The applicant in *BAF Industries* presented over 30 third-party registrations, which included the word “PRO” alone and in various combinations. But the applicant also relied on other evidence. Here, Applicant has presented just over half as many registrations as the applicant in *BAF Industries*, and none is for

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<sup>2</sup> Applicant contends that there are at least 19 registrations for marks comprising “SPARKLE,” but Applicant presents only 16. While such a counting error would not ordinarily be noteworthy, where, as here, the sheer number of registrations represents the sole evidentiary value of Applicant’s presentation, a nearly 20% overstatement is a significant miscalculation.

“SPARKLE” alone; only various combinations, several of which are not close to Opposer’s mark. Also, unlike *BAF Industries*, Applicant’s case hinges *solely* on these registrations and website printouts, without any evidence of competing commercial use.

Even if material to this matter, *BAF Industries* does not assist Applicant. There, the Board relied on the third-party registrations to sustain the opposition and deny registration. The Board determined that the word “PRO” was a weak mark given the number of registrations for similar products, but also held that “no matter how limited [the opposer’s rights] may be,” the opposer was entitled to a measure of protection against the registration of subsequent marks. The applicant was therefore denied registration because the Board determined that the addition of the word “SPECIALTIES” was insufficient to distinguish “PRO SPECIALTIES” from the crowded field of “PRO” registrations. Here, if the Board similarly determines that “SPARKLE” is a weak mark as applied for jewelry (which it should not as Applicant has presented no credible event to justify such a finding), under *BAF Industries*, the Board must likewise sustain the Opposition and refuse the Application. This is fully in accord with another case relied on by Applicant wherein the Board held, “[Third-party registrations] cannot be an aid to an applicant who seeks to register yet another confusingly similar mark.” *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 U.S.P.Q.2d 1404, 1406 (TTAB 1988) (citing *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268 (CCPA 1973)).

Fourth, Applicant’s alleged website printouts, in addition to lacking probative value because Applicant presented no evidence of use, are not competent or admissible and should not be considered. As Opposer pointed out in its Main Trial Brief (at pp. 20-21), the printouts have not been authenticated, and they are unadulterated hearsay sought to be admitted to prove competing use despite no evidence of the methodology for collecting the printouts or evidence

that the printouts reflect any more than a snippet of some unidentified web search(es) on a single day earlier this year. Notwithstanding Opposer outlining its particular objections and counterarguments to the printouts in its Main Trial Brief, Applicant did not address any of them or otherwise present authority that suggests such printouts constitute evidence of actual use. Also, the printouts conspicuously do not include The Bazar Group's current products in connection with the mark SPARKLE, notwithstanding Applicant's adoption of The Bazar Group's litigation position. Applicant simply refers repeatedly to the printouts as "evidence of widespread third party use of 'SPARKLE' in the industry." But they clearly are not. The SPLASHES & SPARKLES® mark is strong. This factor weighs in Opposer's favor.

**2. The Parties' Goods, Channels of Trade and Classes of Purchasers Are the Same**

Applicant acknowledges that its products have been sold "alongside Opposer." (Applicant's Main Trial Brief at 8.) Further, Applicant admits that it "has promoted and offered for sale its jewelry products under the SPARKLE LIFE mark in the same channels of trade, to the same class of customers and at the same trade shows where Opposer promoted and offered for sale its jewelry products under the SPLASHES & SPARKLES® mark." (*Id.*) Accordingly, these factors are undisputed and weigh in Opposer's favor.

**3. Similarity In Appearance, Connotation And Commercial Impression Of The Marks At Issue Supports A Finding Of Likelihood Of Confusion**

Applicant concedes that the parties sell the same goods to the same purchaser in the same channels of trade. (Applicant's Main Trial Brief at 8.) Under the circumstances, the overall commercial impression of the respective marks supports a finding that confusion is likely, as further determined by Opposer's expert through a consumer survey. Applicant failed to submit its own expert report, instead borrowing the failed arguments of another infringer of Opposer's

mark in an unrelated case, as discussed herein. Because Applicant has not otherwise submitted evidence to defeat this Opposition, Applicant resorts to dissecting the marks into various components to manufacture differences. Such practice has been expressly rejected. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). This factor weighs in Opposer’s favor.

#### **4. Opposer Has Demonstrated A Likelihood of Confusion**

The *DuPont* factors weigh heavily in favor of Opposer. The parties sell legally identical goods through identical channels of trade and to identical potential customers. Opposer’s SPLASHES & SPARKLES® mark is strong, its registration is incontestable and Applicant’s mark is confusingly similar in appearance, sound, meaning and commercial impression to Opposer’s SPLASHES & SPARKLES® mark. Dr. Fong’s survey further evidences that confusion is likely. Accordingly, registration of Applicant’s “SPARKLE LIFE” mark in connection with jewelry would create a likelihood of confusion with Opposer’s SPLASHES & SPARKLES® mark and would allow Applicant to trade on the considerable and valuable goodwill that Opposer has built up in its SPLASHES & SPARKLES® mark to Opposer’s detriment.

Applicant’s claim that there has been no actual confusion deserves little weight and is not dispositive. Courts have repeatedly held that evidence of actual confusion is unnecessary to establish likelihood of confusion. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002). Moreover, a finding of lack of actual confusion sufficient to negate likelihood of confusion requires, at a minimum, evidence of longstanding coexistence in the

same marketplace. *See Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001). Applicant has failed to present any evidence to support its claim that there has been no actual confusion despite the parties' products appearing together in the market, and Applicant failed to provide sufficient information in discovery for Opposer to investigate actual confusion. Specifically, Applicant refused to produce any customer lists in discovery or disclose the identities of customers to whom it markets and sells products bearing the SPARKLE LIFE mark. (Kincaid Dec., ¶ 25; see also Docket No 30, Exhibit 1 at No. 14.) The Board accordingly cannot find on this record that there has been a lack of actual confusion, and even if there were no actual confusion, Applicant has failed to establish that such a finding negates the strong likelihood of confusion Opposer has proved.

In sum, Applicant has not presented any competent evidence to rebut likelihood of confusion. It has not produced its own expert survey or any evidence of competing commercial use to defeat this Opposition. Applicant relies exclusively on inadmissible and incompetent evidence that this Board should reject, but even if considered, Applicant's evidence does not remotely tip the scales in its favor. To the extent, however, that there remains any doubt, it should be resolved against Applicant. *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 201, 210 (TTAB 1979) ("[A]ny doubt as to the issue of likelihood of confusion must necessarily be resolved against applicant, the newcomer, who had ". . . a legal duty to select a mark which is totally dissimilar to trademarks already being used in the field.") (citation and quotation marks omitted).

**B. Dr. Fong's Expert Opinion Confirms Likelihood of Confusion**

**1. Dr. Fong's Report is Admissible, Credible and Unrebutted**

Market research experts are often employed to conduct surveys to aid the Board in evaluating likelihood of confusion. *See Helene Curtis Indus. Inc.*, 13 U.S.P.Q.2d 1618 (TTAB 1989 (“Surveys are statistical evidence that can be an aid to the Board.”)) Opposer’s expert, Dr. Fong, has over 30 years of experience designing and implementing trademark surveys, including likelihood of confusion surveys. In this case, Dr. Fong designed and conducted an Internet survey involving questions of pre-screened respondents from the relevant universe (i.e., purchasers of jewelry at the appropriate price points in the appropriate channels) across the United States. Dr. Fong concluded from the survey results that net confusion was 16.5%. As discussed more fully in Opposer’s Main Trial Brief (at pp. 21-25), this is statistically significant and corroborates Opposer’s *DuPont* analysis.

**2. Applicant Raises No Credible Rebuttal to Dr. Fong**

Applicant’s rebuttal to Dr. Fong’s survey and Dr. Fong personally are factually and legally unsupportable. The Board should disregard Applicant’s *ad hominem* attack that “Fong has a history of designing surveys with the intent of reaching the desired result.” (Applicant’s Main Trial Brief at 9.) In support, Applicant refers only to Dr. Fong’s report in *I.P. Lund Trading ApS v. Kohler Co.*, 118 F. Supp. 2d 92 (D. Mass. 2000). Dr. Fong has performed numerous surveys as an expert witness and been qualified to testify several times. (Fong Report at A-2.) The fact that fifteen years ago a court did not credit Dr. Fong’s survey concerning secondary meaning in a trade dress case does not undermine his report in this case. Nor does this isolated decision support Applicant’s bald assertion that Dr. Fong has a “history” of impropriety in designing and conducting surveys.

Applicant's baseless claims impugning Dr. Fong's character are particularly surprising considering Applicant's conduct. Applicant had the opportunity to depose Dr. Fong, but declined. Applicant also elected not to submit a rebuttal expert report in this proceeding. Instead, Applicant plagiarized the vast majority of its argument from a failed Motion *in Limine* (Doc. No. 69) filed by the Bazar Group, Inc. to exclude a different report by Dr. Fong in the unrelated case *JJI International, Inc. v. The Bazar Group, Inc.*, C.A. No. 11-cv-206-ML-PAS (D.R.I.).<sup>3</sup> Worse, Applicant stripped out the evidence The Bazar Group relied on. While The Bazar Group's challenge failed, at least the Bazar Group: (a) deposed Dr. Fong; (b) presented a rebuttal expert report; and (c) presented additional evidentiary support, including affidavits from The Bazar Group. Here, Applicant does not develop its own evidence to fill into the framework of the Bazar Group's motion; it simply omits certain case-specific facts and presents a naked recitation of another litigant's arguments. The comparison is stark:

Applicant's Main Trial Brief:

Fong's opinions rest on a myriad of methodological deficiencies consistent with his basic lack of qualifications to testify as an expert in this case. The numerous and significant flaws, when viewed in their entirety, transcend issues of "weight" and render Fong's conclusions inadmissible.

The Bazar Group's Motion:

Fong's opinions rest on a myriad of methodological deficiencies consistent with his basic lack of qualifications to testify as an expert in this case. The numerous and significant flaws, when viewed in their entirety, transcend issues of "weight" and render Fong's conclusions inadmissible.

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<sup>3</sup> The Bazar Group's Motion *in Limine* was denied in open court. The transcript of the proceedings is Docket No. 104 in the District of Rhode Island action and the denial was noted via a Minute Entry on the docket between Docket Nos. 102 and 103.

### Applicant's Main Trial Brief:

When a survey distorts the marketplace conditions by presenting two products seriatim or side-by-side, without any other products with which the consumer would be confronted in the actual marketplace, the obvious effect would be to exaggerate any confusion that might be detected and, thus, thoroughly undermine the reliability of the survey. *See Simon* 104 F. Supp. 2d at 1044; *see also Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1487-88 (10th Cir. 1987); *Kargo Global, Inc.*, 2007 WL 2258688, at \*7; 4 *McCarthy on Trademarks and Unfair Competition* § 23:59. As has been stated with respect to seriatim presentations of marks, "[t]he proper test for likelihood of confusion is not whether consumers would be confused in a side-by-side comparison of the products, but whether confusion is likely when a consumer, familiar to some extent with the one party's mark, is presented with the other party's goods alone." *Kargo Global, Inc.*, 2007 WL 2258688, at \*9 (quoting *Elizabeth Taylor Cosmetics Co. v. Annick Goutal, S.A.R.L.*, 673 F. Supp. 1238, 1248 (S.D.N.Y. 1987)).

### The Bazar Group's Motion:

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Applicant's Main Trial Brief:

Fong's use of the word "brand" in the initial question impermissibly focused respondents on the branding shown on the products. Surveys must not expose the respondent to a desired response before asking the critical question about a connection between the owners of the contesting marks. *See 5 McCarthy on Trademarks* § 32:172 ("Care must be exercised in framing questions designed to see if a respondent links two entities identified by similar marks. . . . It may be improperly leading to expose the surveyed person to a desired response before asking the critical question about a connection between the owners of the contesting marks."). Fong asked the respondents whether they had "ever seen [Opposer's] brand of jewelry before." Fong Report at 10.

The Bazar Group's Motion:

Fong's use of the word "brand" in the initial question impermissibly focused respondents on the branding shown on the products. Surveys must not expose the respondent to a desired response before asking the critical question about a connection between the owners of the contesting marks. *See 5 McCarthy on Trademarks* § 32:172 ("Care must be exercised in framing questions designed to see if a respondent links two entities identified by similar marks. . . . It may be improperly leading to expose the surveyed person to a desired response before asking the critical question about a connection between the owners of the contesting marks."). Fong asked the respondents whether they had "ever seen [JJT's] brand of jewelry before." Fong Report at 11.

These are just a few examples of wholesale copying from the Bazar Group's motion. A full comparison of the two documents reveals substantial identity between them. The Board should reject Applicant's misappropriation of inapt and failed arguments from The Bazar Group litigation, which are unsupported by any evidence in this Opposition.

**3. Even if the Board Considers Applicant's Regurgitation of The Bazar Group's Failed Motion, The Board Should Likewise Reject Applicant's Arguments<sup>4</sup>**

**a. Dr. Fong's Survey was Properly Designed**

Dr. Fong, who has been designing consumer surveys for 30 years, was guided in his work in this Opposition by the Manual for Complex Litigation (4th Ed.) published by the Federal Judicial Center. (Fong Report at 5.) In accordance with the Manual for Complex Litigation, Dr. Fong ensured: (a) the population was properly chosen and applied; (b) the sample chosen was representative of the population; (c) the data gathered were accurately reported; (d) the data were analyzed in accordance with accepted statistical principles; (e) questions were clear and not leading; (f) the survey was conducted by qualified persons following proper interview procedures; and (g) the process was conducted to ensure objectivity. Although Applicant contends that Dr. Fong's survey design was "fatally flawed," Applicant presents no facts to support this argument. This is a predictable limitation of copying another's work. While the Bazar Group presented a competing expert, Applicant's claims are nothing more than unfounded attorney argument. The Board should not credit Applicant's position.

**i. Dr. Fong Chose and Applied A Proper Survey Population**

Dr. Fong conducted an Internet survey. Internet surveys have been well-accepted in trademark litigation for several years. Gelb & Gelb, *Internet Surveys for Trademark Litigation: Ready or Not, Here They Come*, 97 Trademark Rep. 1073, 1085 (2007). Dr. Fong selected market research firm ResearchNow to assist him with the survey. (Fong Report at 5.)

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<sup>4</sup> As discussed above, the Board should not consider Applicant's unsupported arguments to defeat Dr. Fong. Opposer includes this substantive rebuttal in the event the Board considers them. Given that Opposer prevailed against The Bazar Group on its motion *in limine* and Applicant has adopted those failed arguments, Opposer naturally incorporates herein several of its own arguments from The Bazar Group litigation.

ResearchNow maintains a panel of three million active members from which the appropriate universe of survey respondents can be screened and selected. (*Id.*) For the survey in this Opposition, ResearchNow generated a random sample of its national panel. (*Id.*) Dr. Fong designed a screening protocol to identify qualified participants. (Fong Report at 7-9.) He excluded respondents under the age of 18. (Fong Report at 7.) Dr. Fong validated respondents by their age and gender responses against their profiles with ResearchNow. (*Id.*) He further screened respondents from participation in the survey if they or anyone in their households work in advertising or marketing or are employed by a company that makes jewelry. (*Id.*)

**ii. The Chosen Sample Represents the Population**

Dr. Fong further screened the universe of potential respondents as to jewelry purchasers over the past 12 months, price ranges and the store types from which jewelry was purchased. (Fong Report at D-4.) Given where the parties' respective products are sold and the price points of the products, those who have purchased or are likely to purchase such jewelry accurately reflects the relevant population. Although Applicant repeats a number of unsuccessful criticisms of the representative population raised by The Bazar Group, it does not advance any evidence in support. Dr. Fong's survey was scientifically sound and properly conducted. There is no basis to find otherwise.

**iii. The Fong Report Accurately Reports the Gathered Data**

Dr. Fong selected Applied Marketing Science, Inc. ("AMS") to program the survey and coordinate and oversee the data collection process. (Fong Report at 6.) AMS sent email invitations to complete Dr. Fong's survey to 15,500 individuals. (*Id.*) A total of 1,100 respondents entered the survey conducted between December 27, 2012 and December 28, 2012.

(*Id.*) 412 respondents (37%) met all screening criteria and qualified for inclusion in the survey.  
(*Id.*)

**iv. The Survey's Questions are Clear and Not Leading**

Those qualified to continue to the survey after screening were randomly assigned to a test or a control condition group. (Fong Report at 6.) Dr. Fong designed a survey whereby the “only difference between the two conditions of the survey was the jewelry brand name.” (*Id.* at 6.) Dr. Fong randomized the order of the available responses, such as “Yes,” “No” or “Unsure,” across all respondents to eliminate any bias, known as “order effects.” (*Id.* at 10.)

The main survey began with a photograph of a pair of SPLASHES & SPARKLES® brand earrings on a hangtag that is introduced as a piece of jewelry that may be found in a store or online. (Fong Report at D-6.) The respondents were asked, “Have you ever seen this brand of jewelry before (in person or in an advertisement)?” (*Id.*) Next, Dr. Fong’s survey presented respondents with a second image, and advised them that the second image “shows a different piece of jewelry.” (*Id.* at 11.) For the test group, the next image depicted a photograph of earrings that bear the Applicant’s mark, SPARKLE LIFE, and the respondents were asked whether the same or a different company from the company in the first image shown “puts out” the jewelry, or whether the respondent is unsure. (*Id.* at D-7.) Dr. Fong randomized the order of these responses. (*Id.* at 11) The control group was presented with the same “different piece of jewelry” orienting statement and the same “puts out” question as the test group. (*Id.*) The photograph of the control depicts the same earrings in the same box as the photograph of the Accused Mark shown to the test group; the only difference is the brand of the control, “SHIMMER LIFE.” (*Id.* at D-8.)

Dr. Fong's survey respondents in both the test and control groups that responded that they believed the jewelry in each image is put out by the same company were then asked an open-ended question to explain their position as fully as possible. (Fong Report at D-9.) Respondents who answered that they did not believe the jewelry in each image is put out by the same company, or were unsure, were asked a follow-up question. (*Id.* at 11.) The test group in Dr. Fong's survey was then shown the SPARKLE LIFE branded earrings and asked whether the image is affiliated or connected with the company that put out the jewelry in the prior question. The control group was asked the identical question with respect to SHIMMER LIFE.

Dr. Fong's survey respondents in both the test and control groups who responded affirmatively concerning an affiliation or connection between the brands were then asked another open-ended question to explain their rationale "as completely as possible." (Fong Report at D-12.) The responses were not indicative of any lack of clarity in the questions.

**v. Dr. Fong Analyzed the Data in Accordance with Accepted Statistical Principles**

Applying standard statistical theory, Dr. Fong conducted a chi-square test to these results (34.0% same company responses) and compared them to the respondents in the control group as to their perceptions about SPLASHES & SPARKLES® and SHIMMER LIFE branded products being put out by the same company (16.5%) and determined the difference between these two percentages (17.5%) to be statistically significant, specifically, that respondents in the test condition were significantly more likely (34.0%) to believe that the two products were put out by the same company than were respondents in the control condition (16.5%). (Fong Report at 13.)

Dr. Fong then analyzed the "affiliated company" responses, which represented those respondents who did not think that SPLASHES & SPARKLES® and SPARKLE LIFE branded products are put out by the same company, or were unsure, but did believe the two brands are put

out by affiliated companies. The affiliated responses amounted to 26.7%. (Fong Report at 14, Table 3.) Combining the “same” and “affiliated” company responses ( $34.0\% + 26.7\% = 60.7\%$ ), and applying standard statistical theory, Dr. Fong computed that there was only one chance out of 1,256 that 412 survey respondents (206 each in the test and control condition) would have resulted in a net confusion rate of at least 16.5% if the true difference between the two was really 0%. (Fong Report at 15.)

**vi. Qualified Personnel Conducted the Survey**

Dr. Fong designed the survey, and the AMS computer programmers programmed the survey so that it could be administered on their web-based system. Dr. Fong checked that the programming had been done correctly and to his specifications by going through the survey at the AMS website as if he was a respondent. When Dr. Fong approved the survey after his thorough checking process, AMS then started conducting the survey. AMS staff then collected and tabulated the data under the supervision of Dr. Fong. (Fong Report at 6.) Dr. Fong interpreted the data as set forth above.

**vii. The Survey’s Process Ensured Objectivity**

Dr. Fong’s survey followed the well-established protocol of beginning with an image of the senior trademark, randomizing certain aspects of questions and responses among the test and control group, asking open-ended questions as appropriate, and the survey also drew a universe of potential respondents from a leading online panel provider and screened that universe to eliminate bias and to ensure that respondents were representative of potential consumers of the junior mark. Because Applicant chose not to test any of Dr. Fong’s conclusions through deposition or refute them with an expert, the Board has no basis to conclude that Dr. Fong’s report lacked objectivity or otherwise was flawed.

**b. Dr. Fong's Survey Approximated Marketplace Conditions**

Dr. Fong employed a form of a *Squirt* survey,<sup>5</sup> which is both “well established . . . and endorsed by many courts.” *Healthone of Denver, Inc. v. UnitedHealth Group, Inc.*, 872 F. Supp. 2d 1154, 1187 (D. Colo. 2012). Applicant counters that Dr. Fong’s *Squirt* survey is “frequently criticized” and “highly suggestive” but cites no law in support. (Applicant’s Main Trial Brief at 22.) A *Squirt* survey does not assume that the respondent is familiar with the senior mark. 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 32:173.50 (4th Ed.) Because Dr. Fong designed a forward confusion survey, he presented Opposer’s senior mark first and on its own page view and then presented the junior mark (the test) or the control on the next screen.

Applicant criticizes that the survey did not replicate “actual” marketplace conditions because the products would never be displayed back-to-back. Applicant ignores that surveys are widely accepted even though it is impossible to conduct a survey that simulates “actual” marketplace conditions. “[A]ny survey is of necessity an imperfect mirror of actual customer behavior under real life conditions.” *Mark Bric Display Corp. v. Joseph Struhl Co., Inc.*, C.A. 98-532ML, 2003 WL 21696318, at \*8 (D.R.I. July 9, 2003) Simply put, there is no such thing as a “perfect survey.” *Id.* Moreover, it is not true that the parties’ products would never be displayed back-to-back. Among other market channels, the parties exhibited their products on the same floor at the same trade show in Atlanta in 2013, and Applicant has been featured in GIFTBEAT, a publication subscribed to by many of Opposer’s customers. (See Opposer’s Main Trial Brief at 7-8.) Potential consumers certainly may view the competing products back-to-back, simultaneously or close in time.

Applicant misapplies *Kargo Global, Inc. v. Advance Magazine Publishers, Inc.*, No. 06

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<sup>5</sup> *Squirtco v. Seven-Up Co.*, 628 F.2d 1086 (8th Cir. 1980).

Civ. 550 (JFK), 2007 WL 2258688 (S.D.N.Y. Aug. 6, 2007), an unreported decision from New York, to the facts of this case. *Kargo* is a reverse confusion case that concerned two companies engaged in different businesses. Defendant, Advance Magazine Publishers, Inc., published a men’s shopping magazine. Plaintiff, Kargo Global, Inc. (“Kargo”), “provides content-distribution services to publishers of online content and wireless services.” *Id.* at \*7. Kargo’s expert used as a stimulus for its services an advertisement that “would never be encountered by Kargo’s prospective end users, who were the respondents in the survey.” *Id.* at \*11. The Court also critiqued the decision of Kargo’s expert to use pages from defendant’s magazine “that were not sufficiently representative of Cargo’s [magazine] product. *Id.* at \*11.

As *Kargo* is a reverse confusion case—alleging confusion has occurred because of an infringing use by the better known junior user of the less known senior user’s mark—the Court stated that an *Eveready*<sup>6</sup> survey should have been conducted. *Id.* at \*8. In an *Eveready* survey format, the respondents are shown only *one* stimulus and are then asked questions about the source, business relationship or sponsorship of the stimulus. *Id.* at \*8. This format is used in circumstances where plaintiff and defendant make different products. 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:174 at 32-290, 291 (4th Ed. 2002). Here, Opposer and Applicant are both in the business of selling jewelry. This is not a reverse confusion case. Dr. Fong used actual products from both Opposer and Applicant, not products, as in *Kargo*, that would never be encountered by respondents in the marketplace.

**c. The Fong Survey was Not Leading**

Applicant contends Dr. Fong’s survey was impermissibly leading for three reasons: (1) the use of the word, “brand,” in the first question of the survey suggests a “desired response”; (2)

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<sup>6</sup>*Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir. 1976).



it suffers from “demand effects”; and (3) the “Fong survey used ambiguous and confusing questions appear to have led to erroneous results.” (Applicant’s Main Trial Brief at 26-28.)

None of Applicant’s unsupported claims is valid.

As to use of the word “brand,” Applicant complains that the respondents were asked whether they had “ever seen [Opposer’s] brand of jewelry before,” which “deliberate[ly] suggest[ed] that the survey was about brands” and led respondents “into giving textual responses that were categorized as ‘brand-related.’” (Applicant’s Main Trial Brief at 26.) Applicant’s claim is highly misleading. The textual responses are not responsive to the first, orienting question concerning whether the respondent had seen the brand before; they were responsive to the later question of whether the companies are the same or affiliated. (Fong Report at 10-11.) Moreover, Dr. Fong conducted a likelihood of confusion survey, not a secondary meaning (brand awareness) survey. (Fong Report at 19.) Even if survey respondents believed the survey was about “brands,” there is no basis for Applicant to claim that it led respondents to select that the parties products were put out by the same or affiliated company at a higher rate than otherwise.

Applicant is likewise wrong that Dr. Fong’s question of whether the companies were affiliated or connected was inherently misleading. Again, Applicant fails to support its argument. More importantly, Applicant’s copying of The Bazar Group’s motion has led it to an absurd argument. The Bazar Group argued that the question was misleading (even though its expert asked a similar one) because the response on affiliation appeared to increase net confusion by 6.3%. Here, the affiliation question **decreased** net confusion. (Compare Fong Report at 13, Table 2 with Fong Report at 15, Table 4.) Applicant cannot argue the question was misleading in a way that suggested a connection between the products when the end result was to reduce confusion relative to whether respondents thought the products were from the same company.

Applicant next argues that the Fong survey used ambiguous and confusing questions. Applicant's argument is tough to follow, just as it was when The Bazar Group made it. In any event the district court rejected the argument. As an example of an "ambiguous and confusing" questions, Applicant states, "the Fong survey then showed the non-Opposer product a second time and asked whether "the jewelry in the image above is affiliated or connected with the company that puts out the jewelry *in the image you saw before*, it is NOT affiliated or connected, or are you unsure?" (Applicant's Main Trial Brief at 28 (second emphasis in original).) But that is the same question addressed above. Ultimately, the argument is difficult to decipher, but similarly unsupported in any event.

In sum, Applicant's attacks on Dr. Fong and his survey are not supported by the facts, a rebuttal expert or the law. Dr. Fong is well-qualified to opine on likelihood of confusion in this proceeding, and his survey was properly designed and implemented. The Board should credit Dr. Fong's Report, which corroborates a finding of likelihood of confusion.

## **II. CONCLUSION**

For at least the reasons set forth in Opposer's Main Trial Brief and this Reply, the Board should sustain the Opposition and refuse registration of Application Serial No. 85356064.

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Dated: August 12, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing has been served on counsel to Sparkle Life LLC by sending said copy on August 12, 2014 via electronic mail and First Class Mail, postage prepaid to:

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